

UNDERTAKING

between

THE SECRETARY OF STATE FOR SCOTLAND (hereinafter referred to as "the Secretary of State") of the first part

and

DAVID MACBRAYNE LIMITED incorporated under the Companies Acts and having its registered office at Forty four Robertson Street, Glasgow (hereinafter referred to as "the Company") of the second part.

WHEREAS it is desired by the parties to make provision for sea transport services serving the Western Highlands and Islands as such sea transport services are defined in the Highlands and Islands Shipping Services Act, 1960; THEREFORE IT IS HEREBY AGREED between the parties as follows:—

PART I—GENERAL

Commencement and Duration

1. This Undertaking shall have effect as from the First day of January, Nineteen hundred and sixty two, notwithstanding the dates hereof and, subject to the provisions of Clauses 21 and 23 hereof, shall continue in force for ten years and thereafter from year to year unless or until determined by not less than six months' prior notice in writing given either by the Secretary of State to the Company or by the Company to the Secretary of State.

Provisions as to Board of Directors

2.—(1) So long as this Undertaking continues in force—

- (a) the Secretary of State shall have the right to nominate two persons to be members of the Board of Directors of the Company; and
- (b) the members of the said Board shall be British subjects.

(2) The Company shall, during the currency of this Undertaking, pay to its Directors by way of remuneration whether by way of fees or other emoluments (exclusive of vouched expenses incurred by them or any of them) such annual sum as may be agreed between the Secretary of State and the Company in respect of each of its Directors.

Sub-letting

3. It shall not be competent for the Company to assign or otherwise part with any rights or obligations under these presents or the benefit hereof or of the several matters herein contained to any person or company without the prior consent in writing of the Secretary of State.

Disputes

4. If any question, dispute or difference shall at any time arise between the parties in regard to the meaning or construction of any of the clauses herein contained or any matter connected with or arising out of this Undertaking, the same shall be submitted to an arbiter to be mutually chosen or failing agreement to an arbiter appointed on the application of either party by the Sheriff of Lanarkshire and the award or decree arbitral of such arbiter shall be final and binding upon the parties: declaring that any arbiter appointed shall have power to obtain such skilled assistance as he may, in his discretion, require including without prejudice to the generality power to state a case for the opinion of the Court at any stage of the proceedings.



Scope of Services

5. The Company undertakes (subject to its obtaining any necessary licences in the case of any road services) to maintain such transport services as may be approved by the Secretary of State and amended from time to time in accordance with Clause 6 hereof (such services being hereinafter called the "Approved Services") and a current list of such Approved Services, other than services operated in terms of Clause 6 (5) hereof, shall be made available for inspection by the public as the Secretary of State may direct.

Additional, Altered and Discontinued Services

6.—(1) Subject to the provisions of paragraphs (5) and (6) of this Clause the Company shall, if the Company proposes to introduce any additional service or to alter any existing service, give written notice of such proposal to the Secretary of State, and the Secretary of State may require such additional or altered service to be included in the Approved Services and in that event it shall be so included as from such date as may be specified in writing by the Secretary of State.

(2) The Company shall, if the Company proposes to discontinue any of the Approved Services or part thereof, give written notice of such proposal to the Secretary of State, and such proposal shall not be put into effect by the Company without the prior consent in writing of the Secretary of State.

(3) The Company undertakes (subject to its obtaining any necessary licences in the case of any road services) to carry out any additional service or alteration of service which the Secretary of State may require the Company to carry out and which the Company is reasonably capable of carrying out, and such additional or altered services, as the case may be, shall be included in the Approved Services.

(4) Subject to receipt by the Company from the Secretary of State of not less than three months' prior notice in writing, any service specified by the Secretary of State in such notice shall cease to be included in the Approved Services.

(5) The Company may, at its discretion, operate any occasional excursion or service or any experimental or temporary service without giving prior notice thereof to the Secretary of State, and such excursion or service or experimental or temporary service shall be deemed to be included in the Approved Services, provided that any experimental or temporary service operated in consequence of this paragraph shall not be so operated by the Company for a period exceeding six months.

(6) The Company may, with the consent of the Secretary of State, substitute a ship for a vehicle, or a vehicle for a ship, as the means by which any of the Approved Services is maintained; provided that the consent of the Secretary of State shall not be required in respect of a substitution which is in effect for a period of less than six months.

(7) In the event of any change in the Approved Services under the provisions of the preceding paragraphs of this Clause and on each occasion that any such change shall occur the grant referred to in Clause 12 hereof shall be increased or decreased, as the case may be, by such amount as shall be just in the circumstances and the amount of the increase or decrease shall be ascertained as soon as practicable by agreement between the Secretary of State and the Company and in default of agreement within three months after the change then by reference to arbitration under Clause 4 hereof.

Information

7. The Company shall furnish the Secretary of State with such information as he may require from time to time relative to any of its services.

Vessels

8. For the performance of the Approved Services the Company undertakes to provide whether as owner or charterer or otherwise and maintain in good order a sufficient number of good, substantial and efficient vessels each of adequate power and speed, all such vessels to be fully manned and commanded by a skilful Master.

Road Services

9.—(1) The Company shall apply for and make every endeavour to obtain any necessary licences in respect of the road services from time to time included in the Approved Services, and shall in all respects comply with any conditions attached to such licences.

(2) For the performance of such road services the Company undertakes to provide a sufficient number of motor vehicles complying in all respects with all relative Acts, and Orders, Rules or Regulations made thereunder as may be in force for the time being.

(3) For the performance of such road services the Company undertakes to provide a sufficient number of competent drivers duly licensed to drive.

Connections with Other Public Transport Services

10. The Company undertakes at all times to the best of its ability to ensure that the Approved Services connect with other public transport services.

Fair Wages, etc.

11. The Company shall observe and fulfil the obligations specified in the Resolution passed by the House of Commons on Fourteenth October, Nineteen hundred and forty six, namely:—

(1) (a) The Company shall pay rates of wages and observe hours and conditions of labour not less favourable than those established for the trade or industry in the district where the work is carried out by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in the trade or industry in the district.

(b) In the absence of any rates of wages, hours or conditions of labour so established the Company shall pay rates of wages and observe hours and conditions of labour which are not less favourable than the general level of wages, hours and conditions observed by other employers whose general circumstances in the trade or industry in which the Company is engaged are similar.

(2) The Company shall in respect of all persons employed by the Company (whether in carrying out its part of this Undertaking or otherwise) in every factory, workshop or place occupied or used by the Company for the carrying out of its part of this Undertaking comply with the general conditions required by the said Resolution.

(3) The Company shall recognise the freedom of its workpeople to be members of Trade Unions.

(4) The Company shall at all times during the continuance of this Undertaking display, for the information of its workpeople, in every factory, workshop or place occupied or used by the Company for the carrying out of its part of this Undertaking a copy of the said Resolution.

(5) The Company shall be responsible for the observance of the said Resolution by sub-Contractors employed in the carrying out of this part of this Undertaking, and shall, if required, notify the Secretary of State of the names and addresses of all such sub-Contractors.

PART III—FINANCIAL PROVISIONS

Grant

12.—(1) The Secretary of State undertakes to pay to the Company by way of grant in each year after the commencement of this Undertaking such amount subject to the provisions of Clauses 6, 16 and 19 hereof as may be agreed between the Secretary of State and the Company to be the annual estimated loss incurred after taking into account expenditure properly chargeable in accordance with Clause 15 hereof and also interest on capital employed in maintaining the Approved Services as calculated in Clause 16 hereof. This grant shall be payable in equal instalments monthly in advance, or otherwise as may be agreed between the Secretary of State and the Company, after the presentation of the appropriate claim to the Secretary of State by the Company. Provided, however, that any sum payable to or by the Secretary of State under Clause 16 (2) or (3) hereof shall be deemed to constitute a decrease or increase of the amount of the said grant, as the case may be. Effect shall be given to any increase or decrease in the annual rate of the grant pursuant to Clause 6 (7), 16 (4) or 19 (2) hereof by means of a proportionate increase or decrease in the first monthly instalment following the date on which the increase or decrease shall have been ascertained and in each subsequent monthly instalment or otherwise as may be agreed between the Secretary of State and the Company; in addition a further adjustment may be made in such manner as to give effect to the intention of the parties that the increase or decrease should be effective as from the date on which the event giving rise to the increase or decrease occurred. In the event of the determination of this Undertaking the Company shall refund to the Secretary of State any sum paid in respect of any period after the date of determination.

(2) During the subsistence of this Undertaking the Company shall, on a date in each year to be specified by the Secretary of State, submit to the Secretary of State estimates of revenue to be received and expenditure to be incurred all by the Company during the year commencing on the First day of January immediately following in connection with the Approved Services and such other estimates of revenue and expenditure as the Secretary of State may require.

Investments

13. The Company shall invest at reasonable rates of interest or place on deposit with any bank all its moneys which from time to time during the currency of this Undertaking shall not reasonably be required for the purpose of financing the Approved Services.

Capital Expenditure and Sale of Capital Assets

14.—(1) Subject to the provisions of paragraph (2) of this Clause, a programme of capital investment for the Approved Services shall be agreed from time to time between the Secretary of State and the Company.

(2) Except with the prior written consent of the Secretary of State the Company—

- (a) shall not enter into any capital commitment in excess of Seven thousand five hundred pounds in any one calendar year on any new or existing individual asset used in connection with the Approved Services ; and
- (b) shall not sell any individual asset used in connection with the Approved Services and valued in the Company's books at more than Seven thousand five hundred pounds.

Accounts

15.—(1) The Company undertakes to present to the Secretary of State as soon as possible after the end of each calendar year, and at such other intervals and in such form as may be required by the Secretary of State, audited accounts of the Company in respect of the Approved Services. Such accounts shall be subject to examination and verification with the Company's relevant books, vouchers and documents by the Secretary of State and also by the Comptroller and Auditor General, if he so desires, and the Company shall procure that the said books, vouchers and documents shall at all reasonable times be open to the inspection of the Secretary of State and the Comptroller and Auditor General and such persons as the Secretary of State or the Comptroller and Auditor General shall from time to time appoint in writing for the purpose.

(2) In particular such accounts shall show in respect of the Approved Services the balance (hereinafter referred to as the "subsidised balance") remaining after deducting from the revenue the amount of expenditure and other charges properly chargeable against revenue or the deficit (hereinafter referred to as the "subsidised deficit") if the amount of such expenditure and other charges exceeds the revenue.

(3) The following shall be included as revenue in such accounts:—

- (a) the actual amount receivable by the Company in the relative year in terms of Clause 12 hereof ;
- (b) the interest earned on moneys in pursuance of Clause 13 hereof ; and
- (c) any other revenue received by the Company in respect of the Approved Services.

(4) The following shall *not* be included as expenditure in such accounts:—

- (a) any expenditure of a capital nature ;
- (b) except with the prior written consent of the Secretary of State, any expenditure in respect of repairs of the Company's assets, other than in respect of normal maintenance and running repairs (including normal surveys and drydocking of vessels) ;
- (c) any expenditure in respect of a vessel chartered to the Company without the written consent of the Secretary of State ;
- (d) any taxes the amount of which depends on the income or profit of the Company ;
- (e) any expenditure in respect of interest on loans or advances made to the Company unless the amount and terms of such loans or advances have been approved in writing by the Secretary of State before such loans or advances were made ;
- (f) any expenditure which, in the opinion of the Secretary of State, has not been reasonably and properly incurred in connection with the Approved

Services and any such expenditure included in such accounts shall, at the request of the Secretary of State, be deleted therefrom.

(5) There shall be included as expenditure in such accounts a sum in respect of the depreciation of the Company's assets calculated at such rates and in such manner as may be agreed between the Secretary of State and the Company.

(6) The Company shall effect all usual insurances in connection with the operation of the Approved Services and the net premiums paid in respect of such insurances shall be included in the expenditure and any amounts received in respect of any insurances in connection with the operation of the Approved Services (other than those arising in respect of actual, constructive, arranged or compromised total loss or otherwise of a capital nature) shall be credited to revenue. Insurances of vessels taken on charter by the Company from the Secretary of State shall only be effected in terms of the relative charterparties.

Subsidised Profit or Deficiency

16. As soon as possible after the end of each calendar year a calculation shall be made by the parties to ascertain whether there is a subsidised profit or deficiency (as hereinafter defined) for such year and such calculation shall be made and the subsidised profit or deficiency dealt with in accordance with the following provisions of this Clause:—

(1) (a) For each calendar year there shall be calculated in respect of interest on capital a sum which shall be at the rate as specified in or determined under Clause 17 hereof for that calendar year on the mean of the capital employed on (i) the last day of such calendar year, and (ii) the last day of the preceding calendar year, in maintaining the Approved Services.

(b) If this Undertaking shall be terminated on a date other than the last day of a calendar year, a similar calculation shall be made in respect of the relative part of such a calendar year, the interest being apportioned on a time basis. References herein to a calendar year or to a year shall, except where the context otherwise requires, be deemed to include a reference to such a part of a calendar year.

(2) If there is a subsidised balance for the year and such balance exceeds the interest on capital for that year the amount of the excess shall be known as the subsidised profit for that year and the following provisions of this paragraph (2) shall have effect:—

(a) If the subsidised profit exceeds Thirty thousand pounds the amount of the excess plus the sum of Fifteen thousand pounds shall forthwith be paid by the Company to the Secretary of State.

(b) If the subsidised profit does not exceed Thirty thousand pounds one-half of the amount of the subsidised profit shall forthwith be paid by the Company to the Secretary of State.

(c) In each case the balance shall be retained by the Company.

(3) If (i) the subsidised balance for the year does not exceed the interest on capital for that year or (ii) there is a subsidised deficit for the year then in case (i) the difference between the two sums and in case (ii) the aggregate of the subsidised deficit and the interest on capital shall be known as the deficiency for that year and the following provisions of this paragraph (3) shall have effect:—

(a) If the deficiency exceeds Thirty thousand pounds the Secretary of State shall forthwith pay to the Company the amount of the excess plus the sum of Fifteen thousand pounds.

(b) If the deficiency does not exceed Thirty thousand pounds the Secretary of State shall forthwith pay to the Company one-half of the deficiency.

(4) If for any two consecutive years during the currency of this Undertaking the subsidised profit or deficiency for each year exceeds Thirty thousand pounds the grant referred to in Clause 12 hereof shall be reviewed and altered with effect from the commencement of the following year by such amount, if any, as shall be just in the circumstances and the amount of such altered grant shall be ascertained as soon as practicable by agreement between the Secretary of State and the Company and in default of agreement between them within three months after the subsidised profit or deficiency for the second of such years shall have been ascertained then by reference to arbitration under Clause 4 hereof.

Rate of Interest on Capital Employed

17. For the purposes of Clause 16 (1) (a) hereof—

(1) For each calendar year during the period to the Thirty first day of December, Nineteen hundred and sixty six, the rate of interest allowed on capital employed in maintaining the Approved Services shall be six and five eighths per centum.

(2) For each calendar year during the period commencing on the First day of January, Nineteen hundred and sixty seven, the rate of interest allowed on capital employed in maintaining the Approved Services shall be the Government borrowing rate for a period of over five years and not over ten years on the said First day of January, Nineteen hundred and sixty seven, as determined by the Treasury, and such determination shall be binding upon the parties.

Dividends

18. During the currency of this Undertaking the Company shall not declare or pay in respect of any calendar year dividends which calculated gross on the issued and paid-up share capital of the Company on the Thirty first day of December in each year, exceed in total:—

(a) for any calendar year during the period commencing with the calendar year Nineteen hundred and sixty two and ending with the calendar year Nineteen hundred and sixty six, a sum calculated at the rate of six and five eighths per centum on the said share capital;

(b) for any calendar year commencing with the calendar year Nineteen hundred and sixty seven, a sum calculated at the rate of interest as determined in Clause 17 (2) hereof on the said share capital.

Rates and Fares

19.—(1) During the currency of this Undertaking—

(a) the written approval of the Secretary of State shall be required to the rates and fares to be charged by the Company in respect of the sea services of the Approved Services other than tourist and special passenger summer services and the services specified in Clause 6 (5) hereof;

(b) the Company may at any time make application to the Secretary of State for a change in the rates and fares of such sea services approved under the foregoing sub-paragraph but no such change shall be made without the prior consent in writing of the Secretary of State;

(c) the Company shall forthwith give effect to any change in such approved rates and fares which may be required by the Secretary of State, whether or not the Company has made an application to the Secretary of State in respect thereof;

(d) in exercising his powers under this Clause the Secretary of State shall have regard to (i) the general level of other transport charges, (ii) the financial results of the Company's activities and the amount of grant payable to the Company under this Undertaking and (iii) the effect on the economy of the area served by the Company.

(2) In the event of any change in the said rates or fares pursuant to paragraph (1) of this Clause, as also in the event of any change in the rates or fares charged in respect of the road and goods services of the Approved Services, and on each occasion that any such change shall occur the grant referred to in Clause 12 hereof shall be reviewed and altered by such amount, if any, as shall be just in the circumstances and the amount of the altered grant shall be ascertained as soon as practicable by agreement between the Secretary of State and the Company and in default of agreement between them within three months after the change then by reference to arbitration under Clause 4 hereof: provided that in the event of an application by the Company under paragraph (1) (b) of this Clause, where the Secretary of State is satisfied, having regard to the matters specified in sub-paragraph (d) of said paragraph (1), that the rates and fares should not be changed, the grant may be altered in accordance with this paragraph.

Review of Financial Provisions

20. The whole financial provisions contained in this Part of this Undertaking (with the exception of the rates per centum referred to in Clauses 17 and 18 hereof) shall be examined and reviewed by the Secretary of State and the Company during the year Nineteen hundred and sixty six, such examination and review to be commenced on a date not later than the Thirtieth day of June of that year. If, in consequence of such examination and review, it appears to the Secretary of State or to the Company or to both the Secretary of State and the Company that an alteration or adjustment should be made in any one or more of the financial provisions, the provision or provisions shall be altered or adjusted in such manner as may be just and appropriate in all the circumstances and that as soon as practicable by agreement between the Secretary of State and the Company and in default of agreement between them within three months of the date of commencement of such examination and review then by reference to arbitration under Clause 4 hereof. Any such alteration or adjustment whether by agreement or otherwise shall have effect as from the First day of January, Nineteen hundred and sixty seven, until the termination of this Undertaking.

PART IV—DEFAULT BY THE COMPANY

Summary Determination

21. In the event of any substantial breach of this Undertaking or any part thereof by the Company it shall be lawful for the Secretary of State, if he shall think fit, by writing under his hand at any time to put an end to this Undertaking and thereupon the same shall determine and no compensation shall be payable to the Company on account of such summary determination. This Undertaking shall determine forthwith if the Company provides regular public transport services serving places outwith the Highlands and Islands otherwise than incidentally to the service of places within the Highlands and Islands.

Powers to Secretary of State to Maintain Services, etc.

22. If the Company shall at any time during the currency of this Undertaking after receiving not less than two weeks' notice in writing from the

Secretary of State unreasonably refuse or neglect to maintain any of the Approved Services specified in such notice, it shall be lawful for the Secretary of State to employ any necessary means for the maintenance of such Approved Services and to charge the whole of the expenses incurred thereby to the Company, and—

(a) the Company shall on demand pay the same to the Secretary of State as and for liquidated damages, or

(b) the Secretary of State may deduct all or any part of such expenses from any sum of money then due or that may thereafter become due to the Company by virtue of this Undertaking.

Nothing in this Clause shall prejudice the rights of the Secretary of State to determine this Undertaking under the last preceding Clause hereof.

PART V—DETERMINATION IN THE EVENT OF HOSTILITIES

23. In the event of hostilities in which Her Majesty is engaged this Undertaking may at any time be determined by not less than six months' prior notice in writing given either by the Secretary of State to the Company or by the Company to the Secretary of State.

The parties consent to the registration hereof for preservation and execution.

IN WITNESS WHEREOF these presents consisting of this and the eight preceding pages are executed as follows, videlicet:—they are sealed with the Common Seal of David Macbrayne Limited and are subscribed for and on behalf of the said Company by Ian Patrick Robert Napier, one of the Directors, and by Angus Campbell, Acting Secretary of the said Company, all at London on the NINETEENTH day of DECEMBER in the year NINETEEN HUNDRED and SIXTY ONE before these witnesses Albert Edward Mahoney, Assistant Secretary, Six Amberley Road, Buckhurst Hill, Essex, and Robert Albert Darby, Shipping Clerk, Six Keith Way, Hornchurch, Essex, and they are sealed with the seal of the Secretary of State for Scotland and subscribed for him and on his behalf by Matthew Campbell, Secretary of the Department of Agriculture and Fisheries for Scotland, being an officer duly authorised by the Secretary of State to act in that behalf, both at Edinburgh on the TWENTY SECOND day of the said month of DECEMBER in the YEAR LAST MENTIONED before these witnesses David Alexander Leitch and Catherine Bain Forbes, both Civil Servants with the said Department at Saint Andrew's House, Edinburgh, 1.

Signed

A. E. MAHONEY, Witness.

R. A. DARBY, Witness.

D. A. LEITCH.

CATHERINE B. FORBES.

Signed

IAN P. R. NAPIER, Director.

ANGUS CAMPBELL, Acting Secretary.

M. CAMPBELL.

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